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In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Bank Holding Company Act contains a "grandfather" provision that permits qualifying bank holding companies to continue certain previously allowed insurance agency activities. The court of appeals held that when one bank holding company acquires another bank holding company that engages in "grandfathered" insurance agency activities, the Bank Holding Company Act's grandfather provision remains applicable. The question presented is whether the court of appeals properly conducted the analysis set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in reaching that conclusion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 856 F.2d 282, and the opinion concurring in the denial of petitioners' suggestion for rehearing en banc (Pet. App. 54a-59a) is reported at 862 F.2d 351. The orders of the Board of Governors of the Federal Reserve System (Pet. App. 26a-45a, 46a-52a) are reported at 73 Fed. Res. Bull. 672, 740.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988, and a petition for rehearing was denied on December 2, 1988 (Pet. App. 53a). On January 18, 1989, the court of appeals summarily denied review of a

group of consolidated cases that present the same issue and that are also the subject of this petition for a writ of certiorari (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on March 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Bank Holding Company Act of 1956 (BHC Act), 12 U.S.C. 1841 *et seq.*, imposes certain limitations on a bank holding company's acquisition and retention of the voting shares of other companies. This case involves the situation where a bank holding company acquires another bank holding company that conducts insurance agency activities under certain BHC Act "grandfather" provisions. Petitioners, a collection of insurance agency trade associations, disputed whether the acquired company may continue to conduct the "grandfathered" activities. The Board of Governors of the Federal Reserve System (the Board) concluded that the BHC Act permits the acquired company to do so. The court of appeals agreed. Applying this Court's decision in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it found that "nothing in either the language or structure of the statute, or in the legislative history, conclusively resolves this dispute" (Pet. App. 16a). The court therefore deferred to the Board's construction, concluding that it "is a permissible reconciliation of the inherent tension of the statute" (*ibid.*).

1. Section 4(a) of the BHC Act provides, as a general rule, that no bank holding company shall "acquire" or "retain" voting shares of any company that is not a bank or a bank holding company. 12 U.S.C. 1843(a)(1) and (2). Section 4(c) identifies certain exceptions to this general pro-

hibition, including Section 4(c)(8), which permits a bank holding company to acquire or retain

> shares of any company the activities of which the Board * * * has determined * * * to be so closely related to banking * * * as to be a proper incident thereto * * *.

12 U.S.C. 1843(c)(8). Prior to the enactment of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, the Board had determined that certain types of insurance agency and underwriting activities were "closely related" to banking and therefore permissible for bank holding companies. See 36 Fed. Reg. 15,525 (1971). The Garn-St Germain Act (§ 601, 96 Stat. 1536) amended Section 4(c)(8) to provide that

> it is not closely related to banking * * * for a bank holding company to provide insurance as a principal, agent, or broker except * * * (D) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982 * * *.

12 U.S.C. 1843(c)(8). The "grandfather" exception, known as Exemption D, also imposes limitations on the type and geographic location of the insurance agency activities. 12 U.S.C. 1843(c)(8)(D).

2. In 1986, Sovran Financial Corporation (Sovran), a bank holding company, received the Board's approval to acquire Suburban Bancorp (Suburban), a Maryland bank holding company. As a result of that transaction, Sovran indirectly acquired the voting shares of Suburban's subsidiary, Suburban Bank, and Suburban Bank's wholly owned and "grandfathered" insurance subsidiary, Suburban Insurance, Inc. In a subsequent order, Sovran received the Board's specific approval to retain indirectly

the voting shares of Suburban Insurance, Inc. See Pet. App. 26a-45a.

In a similar acquisition, MNC Financial, Inc. (MNC), a Maryland bank holding company, acquired American Security Corporation, a bank holding company that conducted "grandfathered" insurance activities directly and through a separate nonbank subsidiary. MNC also received the Board's approval to retain American Security's insurance agency activities. See Pet. App. 46a-52a. The Board subsequently approved the acquisition by six other bank holding companies of bank holding companies that were engaged in insurance agency activities on the Exemption D grandfather date. In each case, the Board relied on its *Sovran* order. See Pet. 4.

3. Petitioners sought judicial review of the Board's orders (see 12 U.S.C. 1848), arguing that the Board incorrectly interpreted the BHC Act's Exemption D. The court of appeals affirmed the Board's statutory interpretation (Pet. App. 1a-23a). The court first described the standard of review:

> We examine the language of the statute and, if necessary, the legislative history to determine whether Congress had a specific intent. If the agency's interpretation is inconsistent with Congress's clear intent, that interpretation is invalid. Otherwise, we owe considerable deference to the agency, and we must uphold the agency's interpretation i[f] reasonable. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Securities Indus. Ass'n* v. *Board of Governors*, [847 F.2d 890, 893-894 (D.C. Cir. 1988)].

Pet. App. 11a.[1]

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[1] The typographical error originates in the petition appendix. See 856 F.2d at 287.

The court of appeals determined that petitioners' and the Board's interpretations of the statutory language were both "plausible" (Pet. App. 13a), that "neither in our view flows ineluctably from the statute itself" (*ibid.*), that the legislative history did not provide a "definite answer" (*ibid.*), and that "[w]e are left, then, with competing acceptable interpretations of the words of the statute" (*id.* at 15a). The court then "mov[ed] to the second step of the *Chevron* inquiry" (*id.* at 16a) and concluded that the Board's interpretation was a "permissible reconciliation of the inherent tension of the statute" that provided a " 'reasonable accommodation of the conflicting policies' " (*id.* at 16a, 17a (citation omitted)). Judge Buckley dissented, finding "the statutory language devoid of ambiguity" (*id.* at 20a).

The court of appeals subsequently denied petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. 53a-55a. Judge Silberman and Judge Ruth B. Ginsburg, who formed the panel majority, filed an opinion concurring in the denial of rehearing en banc. They explained that upon reexamination "we are even more convinced than we were when the panel opinion was issued that 12 U.S.C. 1843 does not unambiguously yield the 'perfectly clear' result that petitioners suggest" (Pet. App. 56a). See *id.* at 56a-59a.

ARGUMENT

Petitioners seek review of the court of appeals' decision on a narrow ground that, in petitioners' words, is "distinct" from the banking-law issue that prompted this suit (Pet. 4-5); namely, whether "the D.C. Circuit failed to apply the mandatory first step of analysis this Court set forth in *Chevron*" (*id.* at 5). We submit that the court of appeals properly followed this Court's *Chevron* analysis.

Furthermore, petitioners have failed to demonstrate that there is any "widespread misunderstanding" (*id.* at 6) among the courts of appeals concerning the *Chevron* decision. Even if such misunderstanding existed, this case would not provide an appropriate occasion to address the question because the underlying banking law issue here does not, itself, warrant this Court's review.

1. Petitioners mistakenly contend that "[t]he court of appeals improperly skipped over the first step of the *Chevron* analysis and proceeded to defer to the agency's interpretation of the statute under *Chevron's* Step Two" (Pet. 7). Actually, the court of appeals consciously and carefully applied what petitioners describe as "Step One." The court specifically stated that, under *Chevron*, it must first "examine the language of the statute and, if necessary, the legislative history to determine whether Congress had a specific intent" (Pet. App. 11a). As its opinion shows, the court followed that prescription.

The court first studied the language of Section 4 of the BHC Act, including the relationship between Section 4(a)'s general prohibitions and Section 4(c)(8)'s Exemption D (Pet. App. 11a-13a). It concluded that both petitioners' and the Board's constructions provide a "plausible" interpretation of the ambiguous technical language (*id.* at 13a). Finding no clear answer in the statutory language, the court of appeals next examined the legislative history (*id.* at 13a-15a). It found that this resource did not "provide a definite answer to this question" (*id.* at 13a), and that it was "untenable to conclude that 'Congress has . . . directly addressed the precise question at issue' " (*id.* at 15a, quoting *Chevron*, 467 U.S. at 843).

In short, the court of appeals determined, as its first step, that "nothing in either the language or structure of the statute, or in the legislative history, conclusively

resolves this dispute" (Pet. App. 16a). The court then, in its own words, "mov[ed] to the second step of the *Chevron* inquiry" (*ibid.*) and examined the reasonableness of the Board's interpretation. See *id.* at 16a-17a. Petitioners' contention that the court "skipped over the first step of the *Chevron* analysis" (Pet. 7) accordingly is incorrect.[2]

2. Petitioners' contention that there is "confusion concerning the appropriate point at which to defer to an agency's interpretation of a statute" (Pet. 12) is also incorrect. Petitioners cite three cases in support of their contention that "other circuits are also misinterpreting their responsibilities as reviewing courts" (*ibid.*). See *Lehman* v. *Burnley*, 866 F.2d 33, 36 (2d Cir. 1989); *Puerto Rico Maritime Shipping Authority* v. *Valley Freight Systems*, 856 F.2d 546, 552 (3d Cir. 1988); *Diamond Shamrock Exploration Co.* v. *Hodel*, 853 F.2d 1159, 1165-1166 (5th

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[2] Petitioners contend that "the majority conceded that the words of the statute, if given their literal meaning, make Congress' intent clear" (Pet. 8). The court, however, made no such concession. See Pet. App. 11a-13a. It expressly stated that "both [petitioners' and the Board's] interpretations of the language of Exemption D are plausible; neither in our view flows ineluctably from the statute itself" (*id.* at 13a). After recognizing that petitioners and the Board provided "competing acceptable interpretations of the words of the statute" (*id.* at 15a), the court of appeals observed "that, were we confronted with this question in the first instance, we would prefer petitioners' construction of the statute over the Board's" (*ibid.*). But as the court also recognized (*id.* at 11a, 15a-16a), *Chevron* mandates deference to the agency's reasonable construction of an ambiguous statute. 467 U.S. at 842-845. Indeed, this case illustrates one of the reasons why such deference is appropriate: when the panel majority conducted a "thorough reexamination" of the question on petition for rehearing and suggestion for rehearing en banc—and obtained additional familiarity with this highly technical banking law question—it concluded that "petitioners' reading of the statute may not even be the more natural interpretation of Congress' language" (Pet. App. 56a).

Cir. 1988). In each of those cases, however, the court properly employed the first step of the *Chevron* analysis and examined whether Congress directly and unambiguously addressed the precise question at issue.

In *Lehman,* the Second Circuit upheld the Secretary of Transportation's conclusion that a "matching funds" provision of the Recreational Boating Safety Act, 46 U.S.C. 13101 *et seq.*, that referred to "State amounts expended" (46 U.S.C. 13103(a)(3) (Supp. III 1985)) did not include local government expenditures. The court's " 'starting point' " was " 'the language of the statute itself' " (866 F.2d at 36). Although the court did not cite *Chevron,* it clearly followed *Chevron's* instruction that a court must determine "whether Congress has directly spoken to the precise question at issue" (467 U.S. at 842) before determining whether an agency's construction is reasonable.

In *Puerto Rico Maritime Shipping Authority,* the Third Circuit addressed the Interstate Commerce Commission's interpretation of its jurisdiction over "joint through routes." 856 F.2d at 550-553. The court specifically cited *Chevron's* requirement that "[w]hen Congress has not directly and unambiguously addressed the precise question at issue, a court must accept the interpretation set forth by the agency so long as it is a reasonable one" (856 F.2d at 552). It concluded that the relevant statutory language did not address the "extremely fact-specific" issue at hand and upheld the agency construction as consistent with the statutory scheme and long-standing court decisions. 856 F.2d at 552-553. Thus, that decision is consistent with *Chevron* as well.

In *Diamond Shamrock,* the Fifth Circuit addressed the Secretary of the Interior's requirement that federal oil and gas lessees pay royalties on monies received from "take or pay" sales without regard to the amount of oil and gas ac-

tually produced. See 853 F.2d at 1161. The court likewise began its analysis by identifying *Chevron*'s requirements (853 F.2d at 1165). The court concluded that the relevant leasing statutes did not address the precise question at issue, but it nevertheless rejected the Secretary's interpretation as inconsistent with those statutes (*ibid.*). Contrary to petitioners' suggestion (Pet. 13), there is no logical inconsistency in that result; a statute that is ambiguous may nevertheless preclude certain constructions. But more importantly, the unanimous Fifth Circuit panel, like the unanimous Second and Third Circuit panels, exhibited no apparent "confusion concerning the appropriate point at which to defer to an agency's interpretation of a statute" (*id.* at 12). In each case, the court examined whether the statute provided an unambiguous answer before assessing the reasonableness of the agency's interpretation.

3. Even if petitioners were correct that there is need to clarify the *Chevron* standard, this case does not provide an appropriate occasion for doing so. As the foregoing discussion indicates, petitioners cannot really contend that the court failed to identify and employ the *Chevron* test; instead, petitioners take issue with the court's application of the test to the narrow question of banking law at issue here—i.e., the court's determination that the BHC Act "does not explicitly deal with what happens to grandfather rights once the ownership of the entity holding the rights changes" (Pet. App. 15a-16a). That determination is correct for the reasons stated in the court's opinion and in the majority members' opinion concurring in the denial of the suggestion for rehearing en banc.

In any event, this narrow question of banking law does not warrant this Court's review. The court's resolution affects a limited number of bank holding company acquisitions. Furthermore, the court's decision simply results in maintaining the existing level of "grandfathered" bank

holding company insurance activities and, consequently, "the relative status quo in economic or competitive terms" (Pet. App. 16a). Finally, there is no conflict among the circuits on this question of statutory construction; indeed, the D.C. Circuit is the only court that has had occasion to address the question. In short, even if petitioners were correct in their assertion that there is need for this Court to further clarify its *Chevron* decision, the Court presumably would have numerous opportunities to do so in cases otherwise warranting its review and no substantial reason to do so in this case.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] On May 1, 1989, this Court granted a petition for a writ of certiorari in *Michigan Citizens for an Independent Press* v. *Thornburgh*, No. 88-1640, which expressly requests the Court to clarify certain aspects of *Chevron*. See 88-1640 Pet. i.

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